IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
July 18, 2005 Session

CHARLES W. FISH v. DOLLAR TREE STORES, INC., ET AL.

Direct Appeal from the Circuit Court for DeKalb County
Nos. 8133 and 8319 John Maddux, Judge

No. M2004-01842-WC-R3-CV - Mailed - October 10, 2005
Filed - November 15, 2005

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-255(e)(3) for hearing and reporting of findings of fact and conclusions of law. The plaintiff sustained separate injuries to his right and left shoulders while employed by the defendant. The trial court awarded the plaintiff benefits for 33 percent permanent partial disability to the body as a whole resulting from his right shoulder injury and 55 percent permanent partial disability to the body as a whole resulting from his left. The defendant contends the trial court erred in not applying the two and one-half times impairment rating cap contained in Tenn. Code Ann. § 50-6-241(a)(1).

Tenn. Code Ann. § 50-6-255(e)(3) Appeal as of Right; Judgment of the Circuit Court Affirmed.

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, J., and DONALD P. HARRIS, SR. J. joined.

Joshua M. Booth, Moore, Knoxville, TN, for the appellant, Dollar Tree Stores, Inc.

David E. High, Nashville, TN, for the appellee, Charles W. Fish

MEMORANDUM OPINION

The plaintiff, a fifty-seven-year-old high school graduate, filed these actions seeking benefits for separate right and left shoulder injuries sustained while he was employed as a store manager by the defendant, Dollar Tree Stores, Incorporated (hereinafter "Dollar Tree"). On February 1, 2002, he injured his right shoulder pulling freight, and underwent a total of four surgeries beginning on February 28, 2002. Subsequent operations were performed on April 23, 2002, November 7, 2002, and March 14, 2003. The plaintiff was restricted to performing limited to no work with his right shoulder. Additionally, he gradually injured his left shoulder while

working periodically between his right shoulder surgeries, requiring him to have yet another surgery in June 2003. The plaintiff returned to work after his left shoulder surgery in September 2003, resuming his previous position and rate of pay.

As store manager, 85 percent of his duties were physical, and he requested additional payroll hours so that he might schedule more employees to work during his shifts and assist him in performing physical tasks. Instead, his supervisors instructed him to delegate the duties he could not perform to employees working under the current payroll scheme. The plaintiff contended he could not schedule enough employees to perform all the job duties he found too painful to perform without additional payroll.

Upon returning to work, the plaintiff testified that his injuries made even the simple task of changing price tags severely painful. In an attempt to alleviate his symptoms, the plaintiff began to take the narcotic painkiller hydrocodone, sometimes ingesting four to six tablets a day. On October 2, 2003, he submitted a letter of resignation, stating, "I can't live my life on pain killers" and "can no longer perform the duties of Store manager because of my limitations after [my] surgeries."

Dr. William Blake Garside, the board certified orthopaedic surgeon who performed the plaintiff's surgeries, placed the plaintiff at maximum medical improvement on October 20, 2003, assigning him permanent partial impairment ratings of 6 percent to the body as a whole for his right shoulder and 10 percent to the body as a whole for his left. Both ratings were in addition to any preexisting impairment, including prior workers' compensation injuries the plaintiff incurred while a Dollar General employee. Dr. David Gaw, also a board certified orthopaedic surgeon, performed an independent medical examination and assigned the plaintiff permanent partial impairment ratings of 7 percent to the body as a whole for his right shoulder and 14 percent to the body as a whole for his left, in addition to any preexisting impairment.

Based on this testimony, the trial court awarded the plaintiff benefits for 33 percent permanent partial disability to the body as a whole resulting from his right shoulder injury and 55 percent permanent partial disability to the body as a whole resulting from his left shoulder injury. The trial court found the two and one-half times impairment rating cap contained in Tenn. Code Ann. § 50-6-241(a)(1) did not apply because his return to work was not meaningful.

Discussion

We review findings of fact in workers' compensation cases *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2).

It is provided that:

> where an injured employee is eligible to receive any permanent partial disability benefits, pursuant to § 50-6-207(3)(A)(I) and (F),and the pre-injury employer returns the employee to employment at a wage equal to or

> greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is two and one-
> half (2 ½) times the medical impairment rating.

Tenn. Code Ann. § 50-6-241(a)(1)(2005). The defendant contends this statutory cap is applicable because the plaintiff returned to his management position in September 2003 after having surgery and continued to receive his pre-injury rate of pay. However, an employee's return to work must not only be literal but also "meaningful." *See* ***Nelson v. Wal-Mart Stores, Inc.***, 8 S.W.3d 625 (Tenn. 1999). When determining meaningfulness, courts should examine the employee's reasons for leaving and the nature of the work performed by the employee in relation to the employee's medical restrictions. *See* ***Newton v. Scott Health Center***, 914 S.W.2d 884, 886 (Tenn. 1995).

We have frequently held that a "meaningful return to work" does not occur when an employee resumes her job but subsequently resigns because the performance of the work required was too painful. *See* ***Nelson***, 8 S.W.3d at 630. Similarly, the trial court found this plaintiff resigned because he "was having pain that was so bad" he could "not do the job that he was asked to do." In reaching its conclusion, the trial court expressly rejected defense testimony that the plaintiff "had other staff to delegate to," relying instead upon the plaintiff's assertions.

It is well known that, "[w]hen the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's factual findings." ***Richards v. Liberty Mut. Ins. Co.***, 70 S.W.3d 729, 732 (Tenn. 2002). In this case, the trial court found the plaintiff "a very credible witness" and "believ[ed] basically everything that [he] had to say about this case." We find the evidence does not preponderate against this determination, and affirm the judgment of the trial court. The plaintiff has also alleged the defendant's appeal to this Court was frivolous, warranting an award of damages under Tenn. Code Ann. §§ 50-6-225(h) and 27-1-122. We find no basis for such an award. Costs of appeal are taxed to the defendant, Dollar Tree.

_____

WILLIAM H. INMAN, SENIOR JUDGE

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
JULY 18, 2005 SESSION

CHARLES W. FISH v. DOLLAR TREE STORES, INC., ET AL

Circuit Court for DeKalb County
No. 8133, 8319

No. M2004-01842-WC-R3-CV - Filed - November 15, 2005

JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appeals to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by the Appellant, Dollar Tree Stores, Inc., for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM